(1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NO. 91-937

PETER S. STEIGERWALD,
Petitioner,

v.

ANITA RODEHEAVER, ET AL.,
Respondents

Petition For A Writ Of Certiorari To The Court Of Appeals For The Fourteenth Court Of Appeals District Of Texas

PETITION FOR A WRIT OF CERTIORARI

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Houston, Texas 77002
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Alpha Law Brief Co. — 6113 Aletha Lane — Houston, Texas 77081 — 981-9000

QUESTION PRESENTED

Whether in a civil rights action against a government unit under 42 U.S.C. § 1983 an award of attorney's fees to the prevailing party is mandatory under 42 U.S.C. § 1988 irrespective of a state law rule of governmental immunity to liability for attorney's fees.

LIST OF ALL PARTIES

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(Petitioner here)

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(713) 658-0808
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Attorney for Petitioner

County of Harris, Texas

Anita Rodeheaver, County Clerk of
Harris County, Texas
1001 Preston
Houston, Texas 77002

Nikki Van Hightower, County Treasurer
of Harris County, Texas
1001 Preston
Houston, Texas 77002

J. F. Flack, County Auditor of
Harris County, Texas
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Mike Driscoll
County Attorney
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Harris County Attorneys Office
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NO. _____

PETER S. STEIGERWALD,
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v.

ANITA RODEHEAVER, ET AL.,
Respondents

Petition For A Writ Of Certiorari To The Court Of Appeals For The Fourteenth Court Of Appeals District Of Texas

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Peter S. Steigerwald respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the Fourteenth Court of Appeals District of Texas.

OPINION BELOW

The opinion and judgment of the Court of Appeals for the Fourteenth Court of Appeals District of Texas appears in the Appendix (App. 23-29) and the opinion is reported at 807 S.W.2d 790.

JURISDICTION

The judgment and opinion of the Court of Appeals was rendered on March 7, 1991. Upon an application for writ of error (discretionary review), the Supreme Court of Texas denied writ of error June 19, 1991 (App. 43). A motion for rehearing on the application was denied September 5, 1991 (App. 50). This petition for writ of error has been filed within ninety days of the date finalizing the judgment of the Court of Appeals under 28 U.S.C. § 2101(c), thus satisfying the time requirements for filing a petition for writ of certiorari under Rule 20, Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due proces of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, Section 1, to the Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

42 U.S.C. § 1988:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil

> or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and deposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

References to the record are to the record as contained in the Appendix.

The first opinion of the Court of Appeals (App. 15-22) adequately sets forth the facts of the underlying suit in which attorney's fees were sought by petitioner: His money held in the registry of the court by the County officials earned interest which they wrongfully refused to pay to petitioner and instead paid to Harris County under a statute, Article 2558a, Vernon's Texas Civil Statutes (App. 51a; repealed; *See* recodification at § 117-.054, Tex. Local Government Code), previously ruled unconstitutional by the Supreme Court of Texas.

Petitioner's trial complaint (App. 1-9) alleged specific facts showing that persons (Harris County and certain of its officials) acted under color of statutes of the State (Article 2558a) to subject or cause to be subjected a citizen of the United States (petitioner) to the depriva-

tion of rights, privileges or immunities secured by the Constitution and laws (interest due petitioner on trust funds deposited in court as protected by the Fourteenth Amendment).

The Court of Appeals on rehearing (App. 23-29) sustained respondents' claim that governmental immunity shielded them from liability for attorney's fees awardable under Texas' version of the Uniform Declaratory Judgment Act, § 37.009 Tex. Civil Practices and Remedies Code. This holding is not challenged nor could it be because it is purely a state law issue on declaratory judgment actions, only.

However, the Court of Appeals ignored and refused to rule upon petitioner's point in his brief and motion for rehearing (App. 10-14, 30-35) that a state rule of governmental immunity does not apply to an action under 42 U.S.C. § 1983 or to an award of attorney's fees under 42 U.S.C. § 1988. (App. 36). The Supreme Court of Texas likewise declined to rule on this issue. (App. 37-50).

REASONS FOR GRANTING THE WRIT

The state court has decided a federal question in a way in conflict with applicable decisions of this Court. Rule 17(c), Rules of the Supreme Court of the United States.

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 66 L.Ed.2d 358, 101 S. Ct. 446 (1980), upon identical facts as the case at bar, held that appropriation of private trust fund interest by government under color of state statute was violative of the Fifth and Fourteenth Amendments. This Court cited *Sellers v.*

Harris County, 483 S.W.2d 242 (Tex. 1972), as authority of another state conflicting with the Florida courts' decision. In *Sellers*, upon identical facts involving the same governmental unit as the case at bar, the Texas Supreme Court held that appropriation of private funds under color of state law was "untenable so long as private property is constitutionally protected." 483 S.W.2d at 243. So it should remain.

Clearly, petitioner plead an action under 42 U.S.C. § 1983. He was granted a summary judgment on liability affirmed by the Court of Appeals. Yet, the Texas Courts ignored and refused to rule upon petitioner's point that a state rule of governmental immunity does not apply to civil rights actions, including 42 U.S.C. § 1988.

This Court has settled the question whether state governmental immunity or other state laws can bar suit or limit liability under 42 U.S.C. § 1983 in state court litigation against governmental units. *Felder v. Casey*, 487 U.S. 131, 101 L.Ed.2d 123, 108 S. Ct. 2302 (1988); *Martinez v. California*, 444 U.S. 27, 62 L.Ed.2d 481, 100 S. Ct. 553, (1980). It has ruled that a prevailing party in a civil rights action is mandatorily entitled to an award of attorney's fees. *Blanchard v. Bergeron*, 489 U.S. 87, 103 L.Ed.2d 67, 109 S. Ct. 939 (1989); *Hensley v. Eckerhart*, 461 U.S. 424, 76 L.Ed.2d 40, 103 S. Ct. 1933 (1983). This is the law of the land.

The Texas Courts have ignored their duty to enforce the federal rights of petitioner. *Mondou v. New York, New Haven & Hartford Ry. Co.*, 223 U.S. 1, 56 L.Ed. 327 32 S. Ct. 169 (1912); *Hathorn v. Lovorn*, 457 U.S. 255, 72 L.Ed.2d 824, 102 S. Ct. 2421 (1982).

CONCLUSION

The federal question presented is of importance to the jurisprudence of the nation. If ignoring federal claims and refusing to address them is tolerable, then the federal claims are meaningless and the supreme law of the land is diminished. Writ of certiorari should be issued.

Respectfully submitted,

C. CHARLES DIPPEL
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(713) 658-0808
(713) 658-8467 (Fax)

Attorney for Petitioner

CERTIFICATE OF SERVICE

A true copy hereof has been served upon Bert Crowther, attorney for respondents, via certified mail, return receipt requested this 4th day of December, 1991.

C. CHARLES DIPPEL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NO. _____

PETER S. STEIGERWALD,
Petitioner,

v.

ANITA RODEHEAVER, ET AL.,
Respondents

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NO. 87-31,986

IN THE DISTRICT COURT
OF HARRIS COUNTY, TEXAS
295TH JUDICIAL DISTRICT

PETER S. STEIGERWALD, et al.,
Plaintiffs,

v.

ANITA RODEHEAVER, et al.,
Defendants.

(Filed January 6, 1989)

PLAINTIFF'S FIRST AMENDED
ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs, Peter S. Steigerwald and R. C. Smith, complain of Anita Rodeheaver, County Clerk of Harris County, Texas, Nikki Van Hightower, County Treasurer of Harris County, Texas, J. F. Flack, County Auditor of Harris County, Texas, and the County of Harris, Texas, defendants.

1.

(a) Peter S. Steigerwald is a resident of Harris County, Texas.

(b) R. C. Smith is a resident of Montgomery County, Texas.

(c) Anita Rodeheaver is County Clerk of Harris County, Texas, and has answered herein.

(d) Nikki Van Hightower is County Treasurer of Harris County, Texas, has answerd herein.

(e) J. F. Flack is County Auditor of Harris County, Texas, and has answered herein.

(f) The County of Haris has answered herein.

(g) Because this suit seeks a declaration of the unconstitutionality of statutes applied to the facts of this case, a copy hereof has been served upon the Attorney General of Texas, Jim Mattox, Attorney General's Office, State Supreme Court Building, Austin, Texas.

2.

This is a suit for declaratory judgment, money damages and mandamus against proper officials to enforce and collect a demand arising out of the refusal to pay interest earned upon deposits into the registry of the County Civil Courts at Law held in trust by the County Clerk for the benefit of plaintiffs.

3.

In cause number 428-274 in the County Civil Court at Law No. 4, styled Harris County Flood Control District v. R. C. Smith, the condemning agency deposited the sum of $63,340 into the registry of the court on September 20, 1983, in order to obtain the right of possession of the property sought. The deposit was made under the authority of Section 21.021(a)(1), Property Code, and it was subject to the order of the property owner, R. C. Smith.

4.

The County Clerk received the deposit and thereupon caused it to be deposited, pursuant to Article 2558a, Vernon's Texas Civil Statutes (repealed, now Section 117.021 *et seq.*, Local Government Code), with First City National Bank of Houston, the duly authorized and selected depository for trust funds in possession of the County and District Clerks of Harris County, Texas. In 1985, the depository was changed to Allied Bank of Texas. The pledge contracts under which the depositories held trust funds expressly provide for interest to be paid upon the funds deposited.

5.

The funds so deposited earned interest from the depository. Purporting to act pursuant to Section 4a of Article 2558a, and possibly Article 1656a, V.A.T.S. (repealed, now Section 112.002 *et seq.*, Local Government Code), officials responsible for the sale handling of the deposited funds paid the interest earned thereon to Harris County for use in its General Fund. To the extent Section 4a of Article 2558a and Article 1656a allow or require that the interest earned be paid to Harris County, such statutes are unconstitutional under the state and federal constitutions, including Art. I, Sec. 19, Tex. Const., and the Fourteenth Amendment, U.S. Const.

6.

The earnings on the funds in question are a mere incident of ownership of the funds. None of the defendants owned the funds. The funds were held in trust for the benefit of R. C. Smith and he was eventually adjudged

entitled to such funds. By virtue thereof, he became entitled to interest earned thereon.

7.

Pursuant to order of the court, R. C. Smith withdrew the funds held for him January 7, 1987. The warrant number was 001152, referable to trust fund 14764, and the amount disbursed was $63,340. R. C. Smith was not paid interest earned upon that sum for the period September 20, 1983, to January 7, 1987. Demand was made on his behalf to all defendants to pay interest earned for the period the money was held in the registry and to take all other necessary action for payment of the amounts due him. Despite the clear unconstitutionality of the statutes in question, the defendants fail and refuse to pay interest earned. Such failure and refusal under the circumstance constitutes conversion.

8.

In cause number 443,959 in the County Civil Court at Law No. 1, styled City of Houston v. Peter S. Steigerwald, the condemning agency deposited the sum of $1,427,677 into the registry of the court on September 28, 1984, in order to obtain the right of possession of the property sought. The deposit was made under the authority of Section 21.021(a)(1), Property Code, and it was subject to the order of the property owner, Peter S. Steigerwald.

9.

The County Clerk received the deposit and thereupon caused it to be deposited, pursuant to Article 2558a, Vernon's Texas Civil Statutes (repealed, now Section

117.021 *et seq.*, Local Government Code), with First City National Bank of Houston, the duly authorized and selected depository for trust funds in possession of the County and District Clerks of Harris County, Texas. In 1985, the depository was changed to Allied Bank of Texas, and in 1987 the depository was changed to MBank Houston. The pledge contracts under which the depositories held trust funds expressly provide for interest to be paid upon the funds deposited.

10.

The funds so deposited earned interest from the depository. Purporting to act pursuant to Section 4a of Article 2558a, and possibly Article 1656a, V.A.T.S. (repealed, now Section 112.002 *et seq.*, Local Government Code), officials responsible for the sale handling of the deposited funds paid the interest earned thereon to Harris County for use in its General Fund. To the extent Section 4a of Article 2558a and Article 1656a allow or require that the interest earned be paid to Harris County, such statutes are unconstitutional under the state and federal consitutions, including Art. I, Sec. 19, Tex. Const., and the Fourteenth Amendment, U.S. Const.

11.

The earnings on the funds in question are a mere incident of ownership of the funds. None of the defendants owned the funds. The funds were held in trust for the benefit of Peter S. Steigerwald and he was eventually adjudged entitled to such funds. Specifically, the court trying such condemnation proceeding ordered the County Clerk to disburse such funds to Peter S. Steigerwald, "together with any interest earned thereon."

12.

Pursuant to order of the court, Peter S. Steigerwald withdrew the funds held for him May 19, 1987. The warrant number was 020062, referable to trust fund 15087, and the amount disbursed was $1,427,677. Peter S. Steigerwald was not paid interest earned upon that sum for the period September 28, 1984, to May 19, 1987. Demand was made on his behalf to all defendants to pay interest earned for the period the money was held in the registry and to take all other necessary action for payment of the amounts due him. Despite the clear unconstitutionality of the statutes in question, the defendants fail and refuse to pay interest earned. Such failure and refusal under the circumstances constitutes conversion.

13.

Plaintiffs made their demand upon the appropriate officials and the government to pay interest earned upon such deposits, more than thirty (30) days has elapsed, and defendants have not paid the just amount thereof. All conditions precedent to plaintiffs' recovery have been performed or have occurred.

14.

Plaintiffs sue defendants for a declaratory judgment that the sums deposited by the condemnors to each of their orders were sums to which each was entitled and that the orders and judgments in those cases established plaintiffs' entitlement to the funds and their ownership thereof. Their seek a declaratory judgment that interest earned thereon when deposited with the depository, from the date of deposit until the principal was withdrawn,

acrued to plaintiffs and became theirs. They seek a declaratory judgment of the unconstitutionality of Section 4a of Article 2558a and Article 1656a as plead. They seek a declaratory judgment of the illegality of the payment and receipt and use of that money belonging to plaintiffs. They further seek a declaratory judgment that the refusal of defendants to pay them the interest earned constitutes conversion, is illegal, and is a breach of duty. Plaintiffs seek recovery of interest earned from defendants, together with prejudgment and postjudgment interest thereon. The right of plaintiffs to receive the amounts lawfully owing them is as clear as the duty of the defendants to pay them those sums. The refusal of defendants to pay arises from defendants' refusal to acknowledge a clear and unambiguous duty under the law. Mandamus to each of the entities or persons sued is the only lawfully available remedy to enforce and collect the judgment that should be rendered. Accordingly, plaintiffs ask the court to isue its order that the clerk of this Court issue a writ of mandamus to each of the defendants to perform the duty of each necessary to pay the just claim of plaintiffs.

15.

Plaintiffs ask the Court to award them reasonable and necessary attorney's fees for the prosecution of this suit.

WHEREFORE, plaintiffs pray that defendants be cited herein, and that upon final judgment, they be awarded declaratory judgment, the amounts due them by law, interest thereon, attorney's fees, costs, and such writs as are necessary to effectuate their recovery.

Respectfully submitted,

SEARS AND BURNS
55 Waugh Drive, Suite 400
Houston, Texas 77007-5812
(713) 863-9601

By /s/ C. CHARLES DIPPEL
C. Charles Dippel
(TBN 05891000)
Attorneys for Plaintiffs

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared C. CHARLES DIPPEL, who, uppon his oath, stated that he is attorney of record for Peter S. Steigerwald and R. C. Smith, plaintiffs in the above and foregoing cause, and that as such, he is authorized to make this affidavit, and that the allegations and facts set out in the foregoing Plaintiffs' Original Petition are true and correct.

/s/ C. CHARLES DIPPEL
C. Charles Dippel

SUBSCRIBED AND SWORN TO BEFORE ME by the said C. CHARLES DIPPEL, on this the 6th day of January, 1989, to certify which witness my hand and seal of office.

/s/ LINDA SANDLIN
Notary Public, State of Texas

My Commission Expires:
3-31-89

CERTIFICATE OF SERVICE

A copy hereof has been served upon A. B. Crowther, Jr., attorney for defendants, and the Attorney General of Texas, by Certified Mail, return receipt requested, on this the 6th day of January, 1989.

/s/ C. CHARLES DIPPEL
C. Charles Dippel

CAUSE NUMBER 14 90-00020-CV

IN THE COURT OF APPEALS FOR THE
FOURTENTH SUPREME JUDICIAL DISTRICT
SITTING AT HOUSTON

PETER S. STEIGERWALD,
Appellant-Appellee,

vs.

ANITA RODEHEAVER, et al.,
Appelees-Appelants.

APPELLEES' BRIEF BY
R. C. SMITH AND
PETER S. STEIGERWALD

Law Office of C. Charles Dippel
1415 Louisiana, Suite 2550
(713) 658-0808
Attorney for R. C. Smith and
Peter S. Steigerwald

* * *

the owner did not want the property or had waived the property. No thief whose thoughts are felonious would be entitled to rely upon a victim's conduct to excuse the theft or justify ownership under theories of estoppel or waiver.

The County had no right to rely upon Article 2558a. It had no right to believe it was entitled to interest upon the funds when it was neither condemnor nor landowner. It could not be misled in its budget policies because reliance upon funds gained by an unconstitutional practice is impermissible so long as private property is constitutionally protected.

The County's appeal is frivolous and this Court should assess damages.

REPLY POINT FOUR (RESTATED)

Sovereign immunity, an affirmative defense, was not plead by the County, is irrelevant to a civil rights action under 42 U.S.C. 1983 *et seq.*, and has no application to recovery of attorney's fees in a declaratory judgment action.

Statement, Argument and Authority

(Under Reply Point Four)

The County's trial pleading was its third amended original answer. (Tr. 163) It does not contain any claim of governmental immunity, an affirmative defense which must be plead or it is waived. *Davis v. City of San Antonio,* 752 S.W.2d 518 (Tex. 1988).

Smith's and Steigerwald's trial pleading was their first amended original petition. (Tr. 50) They plead a suit for declaratory judgment, damages and appropriate writs. They also plead all of the elements necessary to state a cause of action under 42 U.S.C. 1983, reading:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . ."

They plead facts showing that persons (the County defendants) acted under color of statutes of the State (Articles 2558a, Sec. 4a and 1656a) to subject or caused to be subjected citizens of the United States (plaintiffs) to the deprivation of rights, privileges or immunities secured by the Constitution and laws (interest due plaintiffs as protected by the Fourteenth Amendment). These pleadings state a cause of action under 42 U.S.C. 1983 which, if proved, make the defendants liable in an action at law or in equity.

Rules 45 and 47, Tex. R. Civ. Pro., only require a statement in plain and concise language of the plaintiffs' cause of action, sufficient to give notice of the claim involved. Pleadings shall be construed so as to do substantial justice. The authorities and commentaries are too numerous to cite that it is not necessary for a pleader to characterize or label his cause of action. So long as the elements of an action or actions are plead, the Court

will give relief under any theory applicable to the pleadings, liberally construed.

State courts have concurrent jurisdiction with federal courts over Sec. 1983 actions, *City of Amarillo v. Langley*, 651 S.W.2d 906 (Tex. App.—Amarillo 1983, no writ), but Texas courts are governed by construction and interpretation given 42 U.S.C. Sec. 1983, *et seq.*, by the federal courts, *Gay v. The State of Texas*, 730 S.W.2d 154, 157 (Tex. App.—Amarillo 1987, no writ).

Section 1988 provides:

> ". . . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The federal courts have interpreted this statute as requiring the award of attorney's fees to a prevailing plaintiff. *Blanchard v. Bergeron*, ____U.S.____, 109 S. Ct. 939 (1989); *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933 (1983); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

The defendants' contention that sovereign immunity prevents an award of attorney's fees against them is not available in civil rights actions under 42 U.S.C. Sec. 1983. *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S. Ct. 2018 (1978); *City of Houston v. De Trapani*, 771 S.W.2d 703, 708 (Tex. App.—Houston [14th District] 1989, writ denied).

Irrespective of the foregoing, case authority of the Courts of Appeals relied upon by the County holding that sovereign immunity precludes an award of attorney's

fees against government in declaratory judgment actions is wrong.

Sovereign immunity involves two distinct concepts: Consent to sue government in the courts of the state and immunity from liability for torts committed by government employees, agents and representatives. 27 Tex. L. Rev. 337 (1949); 44 Tex. L. Rev. 151 (1965); Greenhill and Murto, "Governmental Immunity," 49 Tex. L. Rev. 462 (1971). Consent to sue has been given, Section 81.041, Local Government Code, and attorney's fees are not classified as tort damages.

Attorney's fees against government in declaratory judgment actions are allowable. *Duncan v. Pogue*, 759 S.W.2d 435 (Tex. 1988). There is no reason why government cannot be awarded attorney's fees in such an action. The vice of any holding that sovereign immunity prevents an award of attorney's fees against government, yet government may be awarded such fees, is the inequality between the classes entitled to and subject to attorney's fees. There must be equality in order for the statute to be constitutionally firm. *Gulf Coast and Santa Fe R. Co. v. Ellis*, 165 U.S. 150, 41 L.Ed. 666, 17 S. Ct. 255 (1897).

The County here sought an award of attorney's fees. (Tr. 163)

CONCLUSION AND PRAYER

Smith prays for affirmance of the trial court judgment he was granted, with assessment of damages against the County for a frivolous appeal. Steigerwald prays for severance of the attorney's fees issue referable to him, reversal of that portion of the judgment and remand for partial retrial of attorney's fees due

* * *

Reversed and Remanded in part and Affirmed in part and Opinion filed January 3, 1991.

(S E A L)

In The
Fourteenth Court of Appeals

NO. B14-90-00020-CV

PETER S. STEIGERWALD, Appellant

V.

ANITA RODEHEAVER, COUNTY CLERK OF HARRIS COUNTY, TEXAS, NIKKI VAN HIGHTOWER, COUNTY TREASURER OF HARRIS COUNTY, TEXAS, J. F. FLACK, COUNTY AUDITOR OF HARRIS COUNTY, TEXAS, and HARRIS COUNTY, Appellees

On Appeal from the 295th District Court
Harris County, Texas

Trial Court Cause No. 87-31986

O P I N I O N

Peter Steigerwald appeals from a judgment in which the trial court granted interest on a condemnation award fund and attorney's fees. Steigerwald limits his appeal to his complaint that the trial court awarded an inadequate amount as attorney's fees. Appellees ("Harris County")

filed a cross-appeal and claim the trial court erred in (1) awarding the interest on the funds to Steigerwald and R. C. Smith, (2) disallowing jury issues on estoppel and waiver, and (3) awarding attorney's fees. Concluding the evidence is factually insufficient to support the amount of attorney's fees awarded, we reverse the portion of the judgment that awarded attorney's fees and remand for a new trial on that issue alone. We affirm the remainder of the judgment.

Steigerwald and Smith were landowners in two separate condemnation proceedings. Smith deposited $63,340 into the registry of the court on September 20, 1983, to challenge the county's right to condemn his land. The Harris County clerk held the money until January 7, 1987, when Smith withdrew it. The money earned interest while the county clerk held it. Steigerwald deposited $1,427,677 into the registry of the court on September 28, 1984. Steigerwald withdrew the money on May 19, 1987. Steigerwald's money also earned interest while it was on deposit with the clerk.

Neither Steigerwald nor Smith received the interest earned on the money they had on deposit with the clerk. The county retained the interest earned and placed it into the Harris County general fund. Steigerwald and Smith filed suit against the county clerk and others for declaratory judgment asking the trial court to declare who owned the interest. On motion for summary judgment, the trial court determined as a matter of law that Steigerwald and Smith were entitled to damages and attorney's fees, both amounts to be determined at trial. In the ensuing trial, the jury found Smith was entitled to $16,411.11 in interest and Steigerwald was entitled to $271,-

809.50. They further awarded reasonable and necessary attorney's fees in the amount of $3000 to Steigerwald and $700 to Smith. From the judgment based on those findings and the summary judgment, Steigerwald and the county appeal.

In two points of error, Steigerwald claims the jury's finding of $3000 in attorney's fees is against the great weight and preponderance of the evidence. The jury found that $3000 was a reasonable and necessary attorney's fee for trial and found no attorney's fees for appeal to the court of appeals or the supreme court.

Where the challenge to a jury finding is framed as an insufficient evidence point, the appellate court is to consider all evidence in the case, both that in support of and that contrary to the finding, to determine if the challenged finding is so against the great weight and preponderance of the evidence as to be manifestly unjust. *King v. Bauer,* 688 S.W.2d 845 (Tex. 1985); *In re King's Estate,* 150 Tex. 662, 244 S.W.2d 660, 661 (1951). Where there is a question concerning what constitutes a reasonable attorney's fee, that question is one of fact, which the fact finder must determine. *Great American Ins. Co. v. Britton,* 406 S.W.2d 901, 907 (Tex. 1966); *Aetna Casualty and Surety Co. v. Joseph,* 769 S.W.2d 603, 608 (Tex. App.—Dallas 1989, no writ). The fact finder's determination, however, must have some basis in the evidence. *Aetna Casualty and Surety Co. v. Joseph,* 769 S.W.2d at 608.

The only evidence in the record concerning reasonable attorney's fees comes from the testimony of Charles Dippel, Steigerwald's attorney. Dippel testified he and Steigerwald agreed to a contingent fee arrangement where

reasonable and necessary fees for this case would be $113,609 in the trial court, $22,722 in the court of appeals, and $17,041 in the supreme court. On cross-examination, Dippel testified that a reasonable hourly fee for his services would be $300 to $350 per hour. He also testified that he worked approximately 115 hours on Stegerwald's case. Based on an hourly rate, Dippel testified a reasonable and necessary attorney's fee would be approximately $40,250. Considering this evidence in the light most favorable to the jury's finding, we find there is no reasonable basis in the record on which the finding of $3000 could be justified. We sustain points of error one and two.

Harris County has filed four cross-points of error claiming the trial court erred in (1) granting Steigerwald and Smith's motion for summary judgment; (2) awarding Steigerwald and Smith interest on the award funds; (3) failing to submit issues of estoppel and waiver to the jury; and (4) awarding attorney's fees to Steigerwald and Smith. We have reviewed the record and find that it does not contain the affidavits of R. C. Smith, Peter Steigerwald, and Charles Dippel, plaintiffs' interrogatories and answers, plaintiffs' request for admissions and their responses, certified copies of depository contracts between Harris County Commissioners Court and banks acting as depositories for trust funds held by the district and county clerks, and the deposition of Faye Christopher. Those documents were listed in the motion for summary judgment as summary judgment proof.

As cross-appellant, the county has the burden to bring forward the summary judgment record to prove reversible error. *See Escontrias v. Apodaca*, 629 S.W.2d 697, 699 (Tex. 1982). When the summary judgment record is

incomplete, we must assume that the documents omitted support the correctness of the trial court's judgment. *Chessher v. Southwestern Bell Telephone Co.*, 671 S.W. 2d 901, 903 (Tex. App.—Houston [14th Dist.] 1983) *rev'd on other grounds*, 658 S.W.2d 563 (Tex. 1983).

The county claims the court erred in granting Steigerwald and Smith's motion for summary judgment because they were not the owners of the awards funds and should not be awarded the interest on those funds. The county claims that article 2558a of the Texas Revised Civil Statutes allows it to recover all the interest earned on the award funds to cover its administrative expenses in handling the fund.

In *Sellers v. Harris County*, 483 S.W.2d 242 (Tex. 1972), the supreme court found article 2558a unconstitutional to the extent it deprived the owner of interest on the award funds in a sum not reasonably related to the value of the county's services in safeguarding and investing the principal. That court found the county did not own the funds, but only held them in trust for the litigant who establishes his right thereto. *Id.* The interest earned on the deposit of money owned by the parties to a lawsuit is an increment that accrues to that money and to its owners. *Lawson v. Baker*, 220 S.W. 260 (Tex. Civ. App. 1920, writ ref'd). The supreme court found the county, although not entitled to all the interest on the award funds, is entitled to receive a part of the interest earned on the trust funds as compensation for the accounting and administrative expenses incurred in handling the trust funds." *

---

* Since the disposition of that case, the legislature has codified article 2558a in the Local Government Code. The legislature incor-

The court, in its judgment, found Steigerwald and Smith were entitled to the interest on the accounts, but left the amount of interest to be determined by a trial. Although the county may show what amount it was due for accounting and administrative expenses, it failed to request an issue on how much of the interest was due them for accounting and administrative expenses. Therefore, the county waived any right it had to a portion of the interest on the award funds. We overrule the county's first two cross points of error.

In its third cross-point, the county claims the trial court erred in not submitting issues of estoppel and waiver to the jury. The county alleges that Stegerwald and Smith are estopped to claim interest on the award funds because they chose to contest the condemnors' right to take the property. To establish estoppel, the county must show: (1) a false representation or concealment of material facts, (2) made with knowledge, actual or constructive of those facts, (3) to a party without knowledge, or means of knowledge, of those facts, (4) with the intention that it should be acted on, and (5) reliance by the party to whom the misrepresentation was made, to that party's detriment. *Texas Gas Exploration v. Broughton Offshore Ltd.*, 790 S.W.2d 781, 786 (Tex. App.—Houston [14th Dist.] 1990, n.w.h.).

---

porated the *Sellers* decision and provided the county is entitled to recover a part of the interest earned on funds placed in trust. TEX. LOCAL GOV'T CODE ANN. § 117.054 (Vernon 1988). The revisor's note to section 117.054 states the supreme court's decision indicates that article 2558a is only unconstitutional to the extent that the statute deprived a person of due process and that it is still operable to the extent that a reasonable amount of the interest accumulated on the trust funds may be given to the county to compensate it for the accounting and administrative expenses incurred in handling the trust funds.

Each case in which estoppel is sought to be applied must rest on its own facts. *Barfield v. Howard M. Smith Co. of Amarillo*, 426 S.W.2d 834, 838 (Tex. 1986). Estoppel may be invoked against a party only when he has failed to do that which he has a duty to do. *Vrazel v. Skrabanek*, 725 S.W.2d 709, 711 (Tex. 1987). Waiver results when the evidence proves there has been an intentional relinquishment of a known right. *United States Fidelity & Guaranty v. Bimco Iron*, 464 S.W.2d 353 357 (Tex. 1971). Because we do not have the summary judgment proof in the record before us, we must assume the evidence did not raise the issues of waiver and estoppel. *See Escontrias v. Apodaca*, 629 S.W.2d at 699. Therefore, the trial court properly refused to submit the issues. We overrule the county's third cross-point of error.

In its fourth cross-point, the county claims Steigerwald and Smith are not entitled to attorney's fees because the county is protected by sovereign immunity. The Uniform Declaratory Judgment Act provides that attorney's fees can be recovered in a successful declaratory judgment action. Tex. Civ. Prac. & Rem. Code Ann. § 37.009 (Vernon 1986). Only where the trial court denies declaratory relief or improperly renders a declaratory judgment, is it an abuse of discretion to award attorney's fees to the successful party. *City of Houston v. Harris County Out door Advertising Assoc.*, 732 S.W.2d 42, 56 (Tex. App. —Houston [14th Dist.] 1987, writ ref'd n.r.e.). A governmental unit is not immune under the Uniform Declaratory Judgments Act. *Duncan v. Pogue*, 759 S.W.2d 435, 435-36 (Tex. 1988). Steigerwald and Smith were successful in their declaratory judgment action; therefore, they are entitled to recover attorney's fees from the county. We overrule the county's fourth cross-point of error.

We reverse the portion of the trial court's judgment that awarded attorney's fees and remand for a new trial on attorney's fees alone. We affirm the remainder of the judgment.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed January 3, 1991.

Panel consists of Justices Robertson, Sears, and Draughn.

Publish - Tex. R. App. P. 90.

Motion for Rehearing Granted. Opinion of January 3, 1991 Withdrawn. Affirmed as Modified and Opinion filed March 7, 1991.

IN THE FOURTEENTH COURT OF APPEALS

NO. B14-90-00020-CV

ANITA RODEHEAVER, COUNTY CLERK OF HARRIS COUNTY, TEXAS, NIKKI VAN HIGHTOWER, COUNTY TREASURER OF HARRIS COUNTY, TEXAS, J.F. FLACK, COUNTY AUDITOR OF HARRIS COUNTY, TEXAS, and HARRIS COUNTY,
Appellants

v.

PETER S. STEIGERWALD and R. C. SMITH,
Appellees

On Appeal from the 295th District Court
Harris County, Texas
Trial Court Cause No. 87-31986

OPINION ON MOTION FOR REHEARING

Harris County has filed a motion for rehearing limited to the issue of the award of attorneys fees. On Original submission, we held that a governmental unit is not immune from liability for attorney's fees under the Uniform Declaratory Judgment Act. We cited as authority *Duncan v. Pogue*, 759 S.W.2d 435 (Tex. 1988). The county asserts *Duncan* "is not really dispositive of the issue" because the "defensive issue of sovereign immunity was not discussed." We agree and believe our disposition of the issue deserves more discussion. Neither the supreme court per curiam opinion in *Duncan* nor the court of

appeals opinion (753 S.W.2d 255), which the supreme court reversed, discusses the context in which the issue arose. From the court of appeals opinion, it appears the issue of the award of attorney's fees was raised for the first time on appeal. If this is true the issue was waived, *Davis v. City of San Antonio,* 752 S.W.2d 518 (Tex. 1988), and reliance upon it for the proposition of law we state is not justified.

From the record before us, the real issue facing us is whether the county waived the issue of sovereign immunity from liability for attorney's fees. Since the county did not plead the issue in its answer, it would have been indisputably waived *but for* the manner in which it was presented at trial.

Prior to trial, the court granted plaintiff's motion for partial summary judgment and denied the county's motion to litigate certain issues before the jury. Therefore, the court narrowed the issues to be tried before the jury to "damages," and on June 19, 1989, ordered a hearing be set at a date convenient to all parties. A joint pretrial order was signed by the trial judge and counsel for both plaintiffs and the defendant on August 14, 1989. The order was nine pages in length. Under the heading "AGREED APPLICABLE PROPOSITIONS OF LAW" the parties stated "There are none." Under the heading "CONTESTED ISSUES OF LAW" was the following:

> PLAINTIFF'S POSITION:
>
> The County contests that attorney's fees can be awarded against it under the declaratory judgment act (Section 37.009, Civil Practice and Remedies Code) because of sovereign immunity. Smith and Steigerwald say that consent to sue the County has

been given and this is not a tort action, thus sovereign immunity has no application. Legal memoranda are attached.

DEFENDANTS' POSITION:

1. . . .

2. . . .

3. . . .

4. That the Plaintiffs are not entitled to attorney's fees under the Declaratory Judgment Act, due to the doctrine of sovereign immunity.

"Plaintiffs Legal Memorandum on Attorney's Fees," attached to the pretrial order, did not assert that the county had waived the issue of sovereign immunity by failing to plead it, but instead asserted:

> The Supreme Court has held that attorney's fees can be awarded against governmental entities under § 37.009. *Duncan v. Pogue,* 759 S.W.2d 435 (Tex. 1988). The County will contend that the concept of sovereign immunity prevents an award of attorney's fees against it. The County's contention and any cases supporting it are flawed because
>
> 1. Sovereign immunity involves two distinct concepts: Consent to sue government in the courts of the state and immunity from liability for the torts committed by government's employees, agents and representatives. 27 Tex. L. Rev. 337 (1949); 44 Tex. L. Rev. 151 (1965); Greenhill and Murto, "Governmental Immunity," 49 Tex. L. Rev. 462 (1971).
>
> 2. This is not a tort case, and consent to sue has been given. § 81.041, Local Government Code.
>
> 3. This is a declaratory judgment action.
>
> Sovereign immunity has no application to this case.

The county attached to the pretrial order a photocopy of the three cases it relied upon in support of its position that the doctrine of sovereign immunity precluded an award of attorney's fees: *City of Houston v. Lee,* 762 S.W.2d 180 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *Texas Dept. of Human Services v. Methodist Retirement Services, Inc.,* 763 S.W.2d 613 (Tex. App.—Austin 1989, no writ), and *City of Houstson v. De Trapani,* 771 S.W.2d 703 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

At trial, the county objected to the submission of the attorney fee question to the jury, and following the verdict filed a motion to disregard those findings. Finally, the county filed a motion for new trial contesting the attorney fee award. In all three of the instances, the sovereign immunity defense was asserted. It is interesting to note that plaintiffs also filed a motion to disregard the jury findings on attorney's fees, contending (1) that their cause of action was a § 1983 civil rights action and, therefore it was the duty of the court, not the jury, to access the fees; and that (2) "plaintiffs have also sued under the Declaratory Judgment Act" and that in such action "the great weight of authority is that the Court determines the attorney's fees in its discretion." Accordingly, the plaintiffs requested the court to disregard the jury's answers and that "the Court find attorneys fees as requested." This history has been set out to show how the issue was raised in the trial court and to further show that the plaintiff *never* asserted, prior to the filing of an appellate brief, that the county had waived the doctrine of sovereign immunity by failing to plead it. Further, we find the issue was tried by consent of the parties.

The rule is well settled that an affirmative defense may be tried by consent, even if it is not properly plead. *Gulf & Basco Co. v. Buchanan,* 707 S.W.2d 655 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Liveoak v. Ingham,* 644 S.W.2d 566 (Tex. App.—El Paso 1982, writ ref'd n.r.e.); *Realtex Corp. v. Tyler,* 627 S.W.2d 441 (Tex. App.—Houston [1st Dist.] 1981, no writ); *La Margue Independent School Dist. v. Thompson,* 580 S.W. 2d 670 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ); *Whitley v. Whitley,* 566 S.W.2d 660 (Tex. Civ. App.—Beaumont 1978, no writ). The question here was clearly brought before the court not only by consent, but also by the active assistance of both parties. *Gulf Basco,* 707 S.W.2d at 657. The issue is therefore properly before us.

Attorney's fees are not recoverable against a governmental entity under the Declaratory Judgment Act. *De Trapani,* 771 S.W.2d at 708; *Texas Dept. of Human Services,* 763 S.W.2d at 614; Lee, 762 S.W.2d at 188. Since there is no authority for the assessment of attorney's fees against the county when the defense of sovereign immunity has been raised, we grant its motion for rehearing and modify the judgment to delete the award of attorney's fees. We affirm the remainder of the judgment.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed March 7, 1991.

Panel consists of Justices Robertson, Sears, and Draughn.

Publish - Tex. R. App. P. 90.

MARCH 7, 1991.

JUDGMENT

THE FOURTEENTH COURT OF APPEALS

NO. B14-90-00020-CV

ANITA RODEHEAVER, COUNTY CLERK OF HARRIS COUNTY, TEXAS, NIKKI VAN HIGHTOWER, COUNTY TREASURER OF HARRIS COUNTY, TEXAS, J. F. FLACK, COUNTY AUDITOR OF HARRIS COUNTY, TEXAS and HARRIS COUNTY, APPELLANTS

v.

PETER S. STEIGERWALD and R. C. SMITH, APPELLEES

This cause, an appeal from the judgment in favor of Anita Rodeheaver, County Clerk of Harris County, Texas, Niqqi Van Hightower, County Treasurer of Harris County, Texas, J. F. Flack, County Auditor of Harris County, Texas, and Harris County signed September 13, 1989, came on to be heard on the transcript of the record. We have inspected the record and find the trial court erred in awarding attorney's fees to appellees. We therefore order that portion of the judgment of the court below, which awarded attorney's fees modified to delete the award of attorney's fees. We affirm the remainder of the judgment.

We order to pay Anita Rodeheaver, County Clerk of Harris County, Texas, Nikki Van Hightowner, County Treasurer of Harris County, Texas, J. F. Flack, County Auditor of Harris County, Texas, and Harris Country all

costs incurred by appellants. Additionally, we order Peter S. Steigerwald and his surety, Universal Surety of America, jointly and severally, and R. C. Smith to pay all costs incurred by appellees. This decision is ordered certified below for observance.

MARCH 12, 1991

CAUSE NUMBER 14-90-00020-CV

IN THE COURT OF APPEALS FOR THE
FOURTEENTH SUPREME JUDICIAL DISTRICT

SITTING AT HOUSTON

PETER S. STEIGERWALD
Appellant-Appellee,

v.

ANITA RODEHEAVER, et al.,
Appellees-Appellants.

STEIGERWALD'S MOTION FOR REHEARING

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Attorney for R. C. Smith and
Peter S. Steigerwald

CAUSE NUMBER 14-90-00020-CV

IN THE COURT OF APPEALS FOR THE
FOURTEENTH SUPREME JUDICIAL DISTRICT
SITTING AT HOUSTON
PETER S. STEIGERWALD
Appellant-Appellee,

v.

ANITA RODEHEAVER, et al.,
Appellees-Appellants.

STEIGERWALD'S MOTION FOR REHEARING

TO THE HONORABLE COURT:

Pete Steigerwald moves the Court to grant rehearing on its opinion and judgment dated March 7, 1991, to withdraw the opinion and judgment, and to thereafter affirm the judgment below except as to issue of the amount of attorney's fees, as to which the Court, after confirming Steigerwald's entitlement to attorney's fees, should reverse and remand for retrial on that issue.

GROUNDS FOR REHEARING

GROUND ONE

The Court erred in failing to hold that because Steigerwald pled and obtained affirmative relief under 42 U.S.C. Section 1983, he was mandatorily entitled to an award of attorney's fees under 42 U.S.C. Section 1988, irrespective of sovereign immunity.

GROUND TWO

The Court erred in holding that Steigerwald tried the defense of sovereign immunity by consent.

GROUND THREE

The Court erred in failing to follow and hold that under *Davis v. City of San Antonio*, 752 S.W.2d 518 (Tex. 1988), failure to plead the affirmative defense of sovereign immunity resulted in a waiver of the defense.

GROUND FOUR

The Court erred in holding that the County is immune from suffering an award of attorney's fees under Section 37.009, Civil Practice and Remedies Code.

GROUND FIVE

The Court erred in failing to address and decide Steigerwald's Point One in his brief as appellant, reading:

> "The jury findings on jury question number 2 are against the great weight and preponderance of the evidence."

GROUND SIX

The Court erred in failing to address and decide Steigerwald's Point Two in his brief as appellant, reading:

> "Attorney's fees awarded by the Court in the judgment are inadequate."

ARGUMENT

In Steigerwald's brief as appellee to the County's appeal, pp. 10-12, he demonstrated under his Reply Point Four that his action also constituted a claim under 42 USC Section 1983 upon which he prevailed, mandatorily requiring an award of attorney's fees as to which sovereign

immunity has no application. This Court makes reference to Steigerwald's contention under 42 USC Sections 1983, 1988, in its opinion, p. 4. The Court cites as authority against attorney's fees entitlement under Section 37.009, Civil Practice and Remedies Code, its decision in *City of Houston v. De Trapani,* 771 S.W.2d 703 (Tex. App.—Houston [14th District] 1989, writ denied), which expressly holds that sovereign immunity does not bar an award of attorney's fees in a civil rights suit. Steigerwald is entitled to an award of attorney's fees under 42 USC Section 1988 and the opinion and judgment of March 7, 1991, should be withdrawn.

The Court's holding that Steigerwald tried the affirmative defense of sovereign immunity by consent rests in part upon the mention of sovereign immunity in the pretrial order. Unless this Court is holding that mention of it in a pretrial order is the equivalent of pleading it, the Court holds contrary to *Davis v. City of San Antonio,* 752 S.W.2d 518 (Tex. 1988), requiring the pleading of the defense and rejecting other means of asserting the defense. If post-verdict motions cannot assert or preserve the defense, then stating the issue of sovereign immunity in the pretrial order or an objection to the charge on the issue is not the equivalent. Irrespective, the County here *did not* object to submission of the attorney's fees question until *after* it was submitted. (S.F. 137, 138; Tr. 468, 469) That does not preserve complaint or error under our Rules.

The rule announced by the Court encourages lax attention to the rules of procedure by government and punishes those opposing government by either requiring them to alert the government to get its pleadings right or by condemning them for asserting on appeal that

government has waived a defense.[1] Since no evidence was or could have been adduced on sovereign immunity, and only a law issue was discussed, Steigerwald could not be held to have consented to trial of a matter not then plead.

Steigerwald has set forth in his brief as appellee, pp. 12, 13, the reasons why sovereign immunity cannot apply to awards of attorney's fees under Section 37.009, Civil Practice and Remedies Code. By following prior decisions of this Court and the 1st and 3rd Courts of Appeals holding that sovereign immunity applies, government is entitled to attorney's fees under Section 37.009, yet may not be subjected to attorney's fees under it, imposing on the statute an inequality that is impermissible under the Constitutions. The Court is bound to construe the statute as constitutional, if possible. The only possible constitutional construction is that it applies equally for and against government and sovereign immunity is not applicable.

This Court decided by its opinion and judgment of January 3, 1991, in Steigerwald's favor on his two points as appellant. By withdrawal of the opinion and judgment, those points remain undecided, requiring the Supreme Court to remand to this Court for further action if this Court erred on the issue of entitlement to attorney's fees. Judicial economy strongly suggests that the Court decide those points so that if the Supreme Court

---

1. Steigerwald makes no excuse for *never* asserting prior to appeal that the County had waived the defense by failing to plead it. (Op., p. 4) Responding to the County's appellate brief was the first chance Steigerwald had to assert waiver. He was under no prior obligation to tell the County *other* reasons existed why its position on sovereign immunity was defective.

takes a different view of entitlement to attorney's fees, the only further court action necessary is retrial of the amount of attorney's fees.

WHEREFORE, Pete Steigerwald prays the Court for rehearing, wtihdrawal of the opinion and judgment of March 7, 1991, reversal and remand on the issue of adequacy of attorney's fees, and affirmance otherwise.

Respectfully submitted,

LAW OFFICE OF
C. CHARLES DIPPEL

/s/ C. CHARLES DIPPEL
C. Charles Dippel
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(713) 658-0808
(713) 658-8467 (Fax)
Attorney for Pete Steigerwald

CERTIFICATE OF SERVICE

A copy of the foregoing has been furnished to A. B. "Bert" Crowther by certified mail, return receipt requested, this 12th day of March, 1991.

/s/ C. CHARLES DIPPEL
C. Charles Dippel

FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

March 21, 1991

Hon. C. Charles Dippel
1415 Louisiana
Suite 2550
Houston, TX 77002

Hon. A. B. Crowther, Jr.
Assistant County Attorney
1001 Preston
Suite 634
Houston, Tx. 77002

RE: CASE NO. 14-90-00020-CV
Trial Court Case No. 87-31986

STYLE: Steigerwald, Peter S.
V: Rodeheavor, Anita, Et Al

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

Further, application for writ of error, if any, must be submitted on or before Monday, April 22, 1991.

Mary Jane Smart, Clerk
By Charlene Mitchell

Chief Deputy

NO._____

IN THE
SUPREME COURT OF TEXAS

PETER S. STEIGERWALD,
Petitioner,

v.

ANITA RODEHEAVER, ET AL.,
Respondents.

APPLICATION FOR WRIT OF ERROR

LAW OFFICES OF
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Attorney for
Peter S. Steigerwald

. . . that neither the "facts of the case" nor post verdict motions can preserve the defense.

The governmental unit here did not plead governmental immunity and the Court of Appeals' holding that Petitioner tried the defense by consent by the manner in which it was presented at trial directly conflicts with *Davis v. City of San Antonio, supra.* Neither a statement of contested issues of law in a pretrial order or briefing thereon, nor objection to submission of issues, nor post verdict motions can preserve the defense. All are as suspect as the facts in *Davis v. City of San Antonio, supra,* relied upon by the government to show preservation of the defense. If this Court allows erosion of the holding in *Davis v. City of San Antonio, supra,* by the facts in this case, then the better course is to overrule the decision and allow *ad hoc* determination in each case whether any unplead affirmative defense has been adequately brought to the trial court's attention. Otherwise, the bright line holding of *Davis v. City of San Antonio, supra,* should be honored and reaffirmed.

POINTS OF ERROR

POINT ONE

[Germane to Ground One, Motion for Rehearing]

The Court of Appeals erred in failing to hold that Petitioner pled and obtained affirmative relief under 42 USC Section 1983, thus he was mandatorily entitled to an award of attorney's fees under 42 USC Section 1988, irrespective of governmental immunity. (Tr. 50, 177, 597)

POINT TWO

[Germane to Grounds Two, Three, Motion for Rehearing]

The Court of Appeals erred in failing to follow *Davis v. City of San Antonio*, 752 S.W.2d 518 (Tex. 1988), and hold that failure to plead the affirmative defense of governmental immunity waived the defense, and in holding that Petitioner tried the defense by consent because of the manner in which it was presented at trial. (Tr. 163, 468, 469, 521; Ct. App. Op., pp. 2-4)

POINT THREE

[Germane to Ground Four, Motion for Rehearing]

The Court of Appeals erred in holding that governmental units are immune under the doctrine of governmental immunity from an award of attorney's fees under Section 37.009, Civil Practice and Remedies Code. (Ct. App. Op., pp. 4, 5)

POINT FOUR

[Germane to Grounds Five, Six, Motion for Rehearing]

The Court of Appeals erred in failing to address and decide Petitioner's points one and two in that Court concerning factual insufficiency and inadequacy of the finding of attorney's fees by the jury. (Tr. 572, 597-604; S.F. 81-97)

BRIEF OF THE ARGUMENT

POINT ONE (RESTATED)

The Court of Appeals erred in failing to hold that Petitioner pled and obtained affirmative relief under 42 USC Section 1983, thus he was mandatorily entitled to an

award of attorney's fees under 42 USC Section 1988, irrespective of governmental immunity.

Statement, Argument and Authority

(Under Point One)

Petitioner's trial pleading was the first amended original petition. (Tr. 50; Appendix 1) He plead a suit for declaratory judgment, damages, appropriate writs and attorney's fees. He plead all of the elements necessary to state a cause of action under 42 U.S.C. 1983, reading:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ."

He plead facts showing that persons (Harris County and certain governmental officials) acted under color of statutes of the State (Articles 2558a, Sec. 4a and 1656a, Vernon's Texas Civil Statutes, [repealed, now Sections 117.051, 112.002, Local Government Code]) to subject or caused to be subjected citizens of the United States (Steigerwald) to the deprivation of rights, privileges or immunities secured by the Constitution and laws (interest due Steigerwald on trust funds deposited in court as protected by the Fourteenth Amendment). This pleading states a cause of action under 42 USC 1983 which, if proved, make the defendants liable in an action at law

or in equity. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 101 S. Ct. 446 (1980); *Sellers v. Harris County,* 483 S.W.2d 242 (Tex. 1972). The trial court granted a partial summary judgment on liability. (Tr. 177)

Rules 45 and 47, Tex. R. Civ. Pro., only require a statement in plain and concise language of the plaintiff's cause of action sufficient to give notice of the claim involved. The authorities and commentaries are too numerous to cite that it is not necessary for a pleader to characterize or label his cause of action. So long as the elements of an action or actions are plead, the courts will give relief under any theory applicable to the pleadings, liberally construed. Pleadings shall be construed so as to do substantial justice. Respondents never specially excepted to the pleading as being too indefinite or for a mare explicit statement.

State courts have concurrent jurisdiction with federal courts over Section 1983 actions, *City of Amarillo v. Langey,* 651 S.W.2d 906 (Tex. App.—Amarillo 1983, no writ), but Texas courts are governed by construction and interpretation given 42 USC Sec. 1983, *et seq.,* by the federal courts, *Gay v. The State of Texas,* 730 S.W.2d 154, 157 (Tex. App.—Amarillo 1987, no writ).

Section 1988 provides:

> ". . . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The federal courts have interpreted this statute as *requiring* the award of attorney's fees to a prevailing plaintiff. *Blanchard v. Bergeron*, 489 U.S. 87, 109 S. Ct. 939 (1989); *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933 (1983); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

Respondents' trial pleading was their third amended original answer. (Tr. 163) It does not contain any claim of governmental immunity, an affirmative defense which must be plead or it is waived. *Davis v. City of San Antonio*, 752 S.W.2d 518 (Tex. 1988). The Respondents' contention that governmental immunity prevents an award of attorney's fees against them is not available in civil rights actions under 42 USC Sec. 1983. *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 56 L.Ed.2d 611, 98 S. Ct. 2018 (1978); *City of Houston v. De Trapani*, 711 S.W.2d 703, 708 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

The Court of Appeals recognized in its opinion, p. 4, that Petitioner contended his suit included a civil rights action under 42 USC 1983, and even cited its own opinion in *City of Houston v. De Trapani, supra,* holding that governmental immunity is not available in civil rights actions. Inconsistently, it failed or refused to hold that irrespective of governmental immunity Petitioner was mandatorily entitled to an award of attorney's fees.

Without reaching the issues of waiver of the affirmative defense or whether governmental immunity bars recovery of attorney's fees against government under Section 37.009, Civil Practice and Remedies Code, this Court should grant writ of error, reverse the judgment of the Court below and remand the cause to that Court to

decide Steigerwald's factual insufficiency points on attorney's fees.

POINT TWO (RESTATED)

The Court of Appeals erred in failing to follow *Davis v. City* . . .

Filed June 24, 1991
THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

June 19, 1991

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RE: Case No. D-1052

Style: PETER S. STEIGERWALD
v. ANITA RODEHEAVER ET AL.

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Sincerely,

JOHN T. ADAMS, Clerk
By: /s/ COURTLAND CROCKER
Courtland Crocker, Deputy

NO. D-1052

IN THE SUPREME COURT OF TEXAS
PETER S. STEIGERWALD,
Petitioner,

v.

ANITA RODEHEAVER, ET AL.,
Respondents.

MOTION FOR REHEARING ON
APPLICATION FOR WRIT OF ERROR

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NO. D-1052

IN THE
SUPREME COURT OF TEXAS

PETER S. STEIGERWALD,
Petitioner,

v.

ANITA RODEHEAVER, EL AL.,
Respondents.

MOTION FOR REHEARING ON
APPLICATION FOR WRIT OF ERROR

TO THE SUPREME COURT OF TEXAS:

Petitioner, Peter S. Steigerwald, presents his Motion for Rehearing on his application for writ of error for

revision of the opinion and judgment of the Court of Appeals.

GROUNDS FOR REHEARING

GROUND ONE

The Court erred in failing to hold that Petitioner pled and obtained affirmative relief under 42 USC Section 1983, thus he was mandatorily entitled to an award of attorney's fees under 42 USC Section 1988, irrespective of governmental immunity. The failure of Texas Courts to allow recovery of attorney's fees to a prevailing party in a civil rights action constitutes a denial of equal protection.

GROUND TWO

The Court erred in failing to hold that failure to plead the affirmative defense of governmental immunity waived the defense and in failing to hold that Petitioner did not try the defense by consent because of the manner in which it was presented at trial.

GROUND THREE

The Court erred in failing to hold that governmental units are not immune under the doctrine of governmental immunity from an award of attorney's fees under Section 37.009, Civil Practice and Remedies Code.

GROUND FOUR

The Court erred in failing to remand the cause to the Court of Appeals to address and decide Petitioner's points one and two in that Court concerning factual insufficiency and inadequacy of the finding of attorney's fees by the jury.

Brief of the Argument

The failure of the Court to grant writ of error upon Petitioner's Point One constitutes a failure by this Court to follow unambiguous holdings by the United States Supreme Court compelling an award of attorney's fees to a prevailing party in a civil rights action. This Court has a duty to enforce the federal rights of Petitioner, *Mondou v. New York, New Haven & Hartford Ry. Co.*, 32 S. Ct. 169, 223 U.S. 1, 56 L.Ed. 327 (1912); *Hathorn v. Lovorn*, 102 S. Ct. 2421, 457 U.S. 255, 72 L.Ed. 2d 824 (1982), and exercising discretion to refuse to correct the decision by the Court below denying Petitioner's federal rights does not fulfill that duty.

Petitioner's trial pleading was the first amended original petition. (Tr. 50) He plead generally a suit for declaratory judgment, damages, appropriate writs and attorney's fees. He plead all of the elements necessary to state a cause of action under 42 USC 1983, reading:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizzen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

He plead specific facts showing that persons (Harris County and certain governmental officials) acted under color of statutes of the State (Articles 2558a, Sec. 4a and 1656a, Vernon's Texas Civil Statutes, [repealed, now Sections 117.051, 112.002, Local Government

Code]) to subject or caused to be subjected citizens of the United States (Steigerwald) to the deprivation of rights, privileges or immunities secured by the Constitution and laws (interest due Steigerwald on trust funds deposited in court as protected by the Fourteenth Amendment). This pleading states a cause of action under 42 USC 1983 which, if proved, makes the defendants liable in an action at law or in equity. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 101 S. Ct. 446 (1980); *Sellers v. Harris County*, 483 S.W.2d (Tex. 1972). The trial court granted a partial summary judgment on liability (Tr. 177), thus all theories of recovery applicable to the facts pled were sustained and were not required to be tried at time of trial.

State courts have concurrent jurisdiction with federal courts over Section 1983 actions, *City of Amarillo v. Langley*, 651 S.W.2d 906 (Tex. App.—Amarillo 1983, no writ), but Texas courts are governed by construction and interpretation given 42 USC Sec. 1983, *et seq.*, by the federal courts, *Gay v. The State of Texas,* 730 S.W.2d 154, 157 (Tex. App.—Amarillo 1987, no writ).

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Ct. 939 (1989); *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933 (1983); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

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The Court of Appeals recognized in its opinion, p. 4, that Petitioner contended his suit included a civil rights action under 42 USC 1983, and even cited its own opinion in *City of Houston v. De Trapani, supra,* holding that governmental immunity is not available in civil rights actions. Inconsistently, it failed or refused to hold that irrespective of governmental immunity Petitioner was mandatorily entitled to an award of attorney's fees.

Petitioner contended from the outset in the Court below that he had pled and obtained relief under 42 USC § 1983. That Court failed to address that reply point. Thus, unless the Supreme Court of the United States reverses, the bench and bar of Texas will never know by the opinion of the Court below that Petitioner has been deprived of a federally protected right. This Court's denial of writ, although discretionary, will not alter that fact.

Petitioner requests the Court to correct a wrong where it is obvious, grant rehearing and writ of error, and reverse the judgment of the Court below. Petitioner's other points are adequately brief in his application and do not need repeating here.

Respectfully submitted,

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John T. Adams, Clerk

September 5, 1991

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RE: Case No. D-1052
Style: PETER S. STEIGERWALD
v. ANITA RODEHEAVER ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Sincerely,

JOHN T. ADAMS, Clerk
Courtland Crocker, Deputy
By COURTLAND CROCKER

Art. 2558a
Chapter 2

COUNTY DEPOSITORS

Placing trust funds on time deposit; withdrawals; interest

Sec. 4a. The Commissioners Court of each county, acting by and through the County Auditor, or if there is no County Auditor then the County Treasurer, of such county, is authorized to place on time deposit with the depository bank for trust funds in the possession of County and District Clerks of such County, that portion of the trust funds account estimated by the County Auditor or County Treasurer, as the case may be, as not required immediately to pay out all amounts in accordance with proper orders of the Judge of the Court in which funds have been deposited. If at any time the funds so placed on time deposit are required before maturity, they shall be made available by the depository bank but the depository bank shall not be liable for interest earned on such amount withdrawn from time deposit. The Commissioners Court is authorized and directed to receive all interest so earned on time deposit of such trust funds and to place all such interest into the General Fund of the County as an offset to the expenses of handling such trust funds for the benefit of litigants.